IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

WRIT PETITION NO 427 OF 1990
WITH
CIVIL APPLICATION NO. 1067 OF 1990

Shri P.S. Balkirshnan
since deceased by his L/Rs
and legal Representatives.

1) Mrs. Sushila Balkrishnan (wife)
Occupation-Nil, R/o 11, Saraswat
Colony, 433, Somwar Peth,
Pune-411 001.
Since deceased through following heris;

2) Miss Rama Balkrishnan (Daughter)
Resident as above.

3) Miss. Padma Balkirshnan (Daughter)
Resident as above.

4) Mr. Bal Subramanium Balkirshnan (son)
Resident of Flat No.4, Appollo
Greens, 441/3, Somwar Peth,
Pune-411 011.

5) Mrs. Uma Ranganathan (Daughter)
Resident of Sector 27/A, Nigadi
Pune- 411 044. ... Petitioners.

V/s

1. Shri Jaywant Bapuji Kamat since deceased
thrhough his legal heairs and
representives

1) Smt. Shaila Jaywant Kamat,
r/o Plot No. 277, 5th Season Flat No.10,
5th floor, Shere Punjab, Co-op. Hsg.
Society, Nr. Tolani College, Andheri (E)
Mumbai-93.

2) Mr. Sanjay Jaywant Kamat
since deceased by his heirs.

1-B-1) Mrs. Pratibha Sanjay Kamat
1-B-2) Mr. Kartik Sanjay Kamat

Both residing at C/o Lt. Col.
Subodh Bapuji Kamat 433/11,
Saraswat Colony, Somwar Peth,
Pune-411 001.

3) Mrs. Ranjana Sunil Pendnekar,
Plot No. 154/2, Flat No.2,
Shere Punjab Coop. Hsg.Soc.,
Nr. Tolani College, Andheri (E),
Mumbai-93.

2. Lt.Col. Subodh Vasant Bapuji Kamat
Occupation Retired Army Officer,
residing at 433/11 Somwar Peth,
Saraswat Colony, Pune-411011.

Mr. Y.B. Naik for the petitioners.
Mr. S.M. Mahamane with Mr. C.R. Dalvi for the respondents.

CORAM : ANOOP V.MOHTA J.

DATE : 25TH JULY, 2005.

ORAL JUDGMENT

. The petitioner is the tenant. The respondent is the landlord-plaintiff. The suit premises situated at House No. 433/11, Somwar Peth Pune. The Principal Judge, Small Cause Court, Pune, (trial Court) by the Judgment dated 10th August 1997, dismissed the suit for possession. Therefore the landlord preferred the Civil Appeal No 909/1987, in the Court of Additional District Judge, Pune, (Appellate Court). The appellate Court by the impugned judgment and order dated 4/1/1990 allowed the appeal and the judgment and the decree passed by the

trial Court was set aside. In the result the petitioner-tenants have been directed to deliver the possession of the suit property only on the ground of securing an alternative suitable residence, as contemplated under the Bombay Rents, Hotel Lodging and House Rates Control Act, 1947 (for short Bombay Rent Act). Therefore, the present petition.

2. Heard the learned Counsel, Mr. Naik, for the petitioner. The respondent-landlord averred in the plaint as under;

> "The defendant has acquired spacious and alternate residential accommodation in the name of his son and daughter in 307, Somwar Peth, Pune, after coming into force of the Bombay Rent Act. The defendant has kept the suit premises locked up."

3. This was specifically denied in para 7. the evidence was led by the parties. The respondent-landlord in his cross-examination has stated as under;

> "The flat in H.No. 307, Somwar Peth is situated on the first floor. Its number is (102). Today, except for my oral evidence, there is no other evidence to show that the said flat has been purchased by the defendant. The builder of the property No.(307) is Shri Ranade. I have not seen the agreement in between the Builder

and the defendant."

The petitioner-tenant in para 5 stated as under;

> "I have not purchased any flat, or premises in Somwar Peth, Pune. It is not true that the flat in 307, Somwar Peth, Pune has been purchased by me with my own money in the name of my son and daughter. My son is the owner of the flat No. 307, Somwar Peth, Pune. My son is (28) yrs. Old. He is of marriageable age.

In his cross-examination the petitioner has stated that;

> "I do not know the Company where my son is serving. I do not know the salary drawn by me son. My son is present in the Court. My elder daughter is a Lecturer in St. Mira College."

The trial Court after considering the evidence led by the parties, dismissed the suit. The appellate Court however, considered basically the aforesaid evidence and on the foundation that there were suppression of facts in regard to the income and salary of his son, accepted the case of the landlord and disbelieved the version of the petitioner.

3. The appellate Court has in fact strongly relied on the Judgments of Bombay High Court, in (1986 Bombay Rent Cases 295) (Chimanlal Sakalchand Shah V. Dnyanoba S. Kodre) and observed that the evidence of defendant does

not inspire confidence that his son aged 28 years could on the strength of mere service able to acquired a flat in 307 Somwar Peth of carpet area 450 sq. feet. He further observed that "what is material is not in whose name the flat stands. Materia is who has acquired it." The appellate Court thereafter, accepted the evidence of P.W.1.

4. In my opinion, the appellate Court has not taken into consideration the basic aspect that initial burden lies on the landlord to prove that the tenant has acquired a suitable accommodation. In the present case, the positive averments made that the tenant has acquired spacious alternative residential accommodation in the name of his son and daughter. Except the oral evidence, there is no material to justify this. The flat is in the name of son and daughter of the tenant is within the knowledge of the landlord as alleged. Therefore, the burden lies heavily on the landlord to justify that said flat has been acquired by benami transaction, by the tenant, in the name of his son and daughter. There is no such material placed on the record, except the bare statement. Considering the averments made in the plaint itself, in my view the burden was not discharged by the

landlord to justify that the property in fact is of tenant though it is in the name of his son and daughter.

5. In view of this the judgment referred, Chimanlal (Supra), no where supports the case of the landlord to reverse the order passed by the trial Court. The facts of that particular case were distinct and distinguishable. In the case of Chimanlal the property was purchased in the joint name. There was admission that some portion of the consideration was paid by both. In the present case there is no such material on the record of such joint contribution. There is no supporting evidence justify that it is the petitioner-tenant who has purchased the property and is the owner of the same and not his son and daughter. In this background, I am of the view that the appellate Court has not considered Chimanlal's case in its proper perspective. I am of the view that the reasoning given by the trial Court is correct. There are no other grounds raised.

6. There is an Civil Application No. 1067/1990 filed by the petitioner-tenants to justify his case that property in question has been purchased by the son

acquiring loan, and not by him, and prayed for the production of the documents. By an order dated 1/3/1990, it was directed to be heard along with the present writ petition. There is an affidavit to oppose the same, dated 16th November, 1991. However, in view of the above observations, I am convinced, on merit itself and on the basis of existing material and the reasoning given by the trial Court, I am not considering this application. It is accordingly disposed of.

8. For the reasons recorded above, the present petition is allowed. The judgment and order dated 1/4/1999 is set aside. The Judgment and decree passed by the trial Court in Civil Suit .No. 1131/1986, dated 10th August 1987 is restored. The suit is dismissed. Rule made absolute in terms of prayer (b). However, there shall be no order as to cost.

[ANOOP V. MOHTA, J.]